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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No......

STATE OF WASHINGTON, *Petitioner,*

vs.

INLAND EMPIRE REFINERIES, INC., A CORPORATION, *Respondent,*

MONTANA HEADLIGHT OIL COMPANY, A CORPORATION, AND GREAT NORTHERN RAILWAY COMPANY, A CORPORATION, *Interveners-Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF WASHINGTON

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

That petitioner (appellant in the Supreme Court of the State of Washington) appealed from the judgment

of the Superior Court for Thurston County, holding and declaring as unconstitutional and void the 1939 distributors petroleum products excise tax law (Chapter 186, Laws of Washington for 1939; *post* pp.....). The judgment of the Superior Court was affirmed by the State Supreme Court (Appendix A).

I

SUMMARY STATEMENT OF THE MATTER INVOLVED

At its 1939 session, the Legislature of the State of Washington enacted a revenue measure known as Chapter 186, Laws of 1939, which imposed an excise tax on distributors of petroleum products, which tax amounted to one-quarter cent on each gallon of petroleum products withdrawn, sold, distributed or in any manner used by the distributor. The statute repealed Laws 1935, Chap. 180, Sec. 78-81, as amended by Laws 1937, Chap. 116, pp. 459-462, and constituted a new and complete taxing statute within itself.

The 1939 statute contained six exemptions in Section 15, of which the three following were considered in the state decision.[1]

On June 27, 1939, the Attorney General of the State of Washington, pursuant to the 1939 statute, instituted the present proceedings against Inland Empire Refineries,

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[1] "Sec. 15. The dsitributor shall be exempt from the tax herein imposed upon the following; * * *

"(d) Withdrawal, sale or distribution of petroleum products by a distributor to any vessel engaged in foreign commerce.

"(e) Withdrawal, sale or distribution by a distributor of all petroleum products derived from the refining within this state of crude petroleum or crude oil.

"(f) Withdrawal, sale or distribution of petroleum products by a distributor to any person who is subject to tax under title V, chapter 180, Laws of 1935, and amendments thereto, and who purchases such petroleum products for the purpose of converting and who does actually convert the same into manufactured gas for distribution to the public."

Inc., to collect a tax of $430.39 assessed upon 172,117 gallons of fuel oil refined within the state, and sold and distributed by the defendant. The tax was resisted on ground that defendant was within the exemption provided by Section 15, Sub. Div. (e); and the Attorney General contended that the statute continued in full force and effect by virtue of an extensive severability clause contained in Section 21.[2]

Before the case went to trial, the Great Northern Railway Company and the Montana Headlight Oil Company intervened by petition. Whereas the defendant Inland Empire Refineries, Inc., took the position that the statute was constitutional in its entirety, the Great Northern Railway Company assumed the burden of a direct attack on the statute, claiming that the enactment violated the privileges and immunities clause of Art. I, Sec. 12 of the State Constitution, the commerce clause of Art. I, Sec. 8, Clause 3 of the Federal constitution, and the equal protection clause of the 14th amendment to the constitution of the United States. On the 9th day of September, 1939, without changing the issues, the case of *State v. Inland Empire Refineries, Inc.*, was consolidated by stipulation for the purposes of trial with the case of *Great Northern Ry. Co. v. Dave S. Cohn* and *Tide Water Associated Oil Company*, for a declaratory judgment.

The superior court of the State of Washington held the statute unconstitutional in its entirety, rendering the following memorandum opinion: "For the reasons as-

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[2] "Sec. 21. If any section, sub-section, clause, sentence or phrase of this act, including those setting forth any penalty, exemption or definition, is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this act, and the legislature hereby declares it would have enacted this act if such section, sub-section, clause, sentence or phrase were omitted."

signed and argued, the Court finds that the act in question; that is, the fuel oil act, is unconstitutional and void. Judgment may be taken accordingly."

The Supreme Court of the State of Washington affirmed the judgment on the grounds that the statute unreasonably discriminated between users of petroleum products and users of hard fuels; that conditions in the statute imposed burdens on intertate commerce; and that exemptions in Subdivisions (d), (e) and (f) were unreasonably discriminatory. The opinion reported as the *State of Washington v. Inland Empire Refineries, Inc. et al.*, 103 Wash. Dec. 573, 101 P. (2d) 975, is appended hereto, and analyzed hereinafter.

II

I: The jurisdiction of the Supreme Court of the United States to review this case is sustained by virtue of the statutory authorization contained in 38 U. S. C. A. 344 (b).

II: The state statute under consideration is Chapter 186 of Laws of 1939; the pertinent provisions of which may be summarized as follows:

Section 1 levies upon every distributor an excise tax of ¼ cent for each gallon of refined or partially refined liquid or liquefiable petroleum products withdrawn, sold, distributed or in any manner used by the distributor in the State of Washington except as exempted by Section 15.

Section 2 (a) defines a distributor as any person or company who: refines, manufactures or compounds petroleum products and withdraws, sells, or uses the same

within the state; or acquires the same within the state from one refining it within or importing it into the state and upon which the ¼ cent tax has not been paid; or imports the petroleum products into the state and withdraws, sells, distributes or used the same within the state.

Section 3 requires every distributor to make application for a license, to post a bond, and to pay a filing fee of $10.00.

Section 4 provides for the issuance of a license, license card and license certificate, and also provides for a hearing in case the Director of Licenses cancels a license or refuses to grant a license.

By Section 6, each distributor is required to file, on or before the 15th day of each month a sworn statement showing the number of gallons he has withdrawn, sold, distributed or used during the preceding month, and upon his failure to so do, the Director of Licenses is authorized to determine the amount, to assess the tax, and to add a 10% penalty.

By Section 7 each distributor is penalized 10% upon failure to make payment upon the day set. This section also provides for the assessment of the tax upon all persons acting as distributors without licenses and the imposition upon them of a 100% penalty.

Section 8 impresses all property of delinquent distributors with a lien in favor of the state.

Section 15 makes provision for six exemptions to the distributor. The first three relate to interstate and foreign commerce, exports and distribution to the United States. The latter three have received previous mention.

Section 16 imposes penalties for failure to pay tax, and for violation of any provisions of the act.

Section 21 contains an extensive severability clause.

III: The final judgment was entered by the Supreme Court of the State of Washington on July 3, 1940.

Respondent respectfully submits that this court has jurisdiction to review a decision of a state court when the state decision has been placed on both state and federal grounds which are so interwoven and intertwined that a non federal ground upon which the opinion could be sustained cannot be isolated; and has jurisdiction to review a decision of the state court where reliance was placed on both state and federal grounds, to determine if there were fair and substantial evidence upon which the state ground could be sustained.

Petitioner respectfully submits that for the following reasons set forth herein and developed more fully in the appended brief, the United States Supreme Court, under the above principles, has jurisdiction to review this case on writ of certiorari.

A: The state court invalidated that portion of the statute which imposed a tax on distributors of petroleum products, without imposing a corresponding tax on distributors of hard fuels, on the sole authority of the 14th amendment to the federal constitution.

Although both the 14th amendment to the federal constitution and the privileges and immunities clause of Art. I, Sec. 12 of the state constitution were mentioned by the state court, the statute was not violative of the state constitution and therefore was invalidated by virtue of its repugnance to the federal constitution. The

state privileges and immunities clause, by express terms, prevents the granting of privileges or immunities to any citizen or class of citizens which shall not upon the same terms belong to all citizens, but does not by its terms prevent the imposition of burdens on one citizen or class of citizens which have not been imposed on all citizens, whereas the federal equal protection clause is not limited in operation to statutes granting privileges or immunities, but extends alike to all laws which do not operate equally, and thereby guarantees equal protection of laws. The tax is a burden—and as a burden must be equally imposed to satisfy the 14th amendment to the federal constitution. The tax is not a privilege or immunity within the scope of the state clause, and therefore cannot be rendered invalid by the operation of the state privilege and immunity clause. Reference to the state clause was made for the purpose of recognizing that the state court will permit a reasonable classification in excise tax legislation.

B: In the alternative petitioner respectfully submits that there was an insufficiency of fair and substantial evidence upon which the state court could predicate a finding either that the tax unreasonably discriminates against petroleum products, or that there was not a reasonable basis upon which a distinction between distributors of petroleum products and distributors of hard fuels could be drawn. This position is emphasized by the fact that the state court inadvertently referred to the tax, and investigated the record before it, as if the tax were a pass on tax or a tax on the consumer. Evidence to support discrimination as to the consumer does not by that token support the same result when the

tax is viewed in the light of its true impact on the distributor, for the excise is levied on the distributor, not on the consumer.

C: The state court determined that the conditions imposed by the statute upon the distributors of petroleum products constituted an unlawful burden on interstate commerce. The regulation and control of interstate commerce are federal questions the ultimate determination of which are within the sole jurisdiction of the Supreme Court of the United States.

D. Petitioner respectfully submits that there is not fair and substantial evidence upon which the decision invalidating the exemption contained in Sec. 15, Subdivisions (d) and (f), can be grounded.

The state court held that the exemption contained in Sec. 15, subdiv. (d) exempting the distributor from the tax upon withdrawal, sale or distribution of petroleum products to any vessel engaged in foreign commerce, unreasonably discriminated against railroads and other transportation agencies similarly engaged in foreign commerce. The tax was not levied on vessels or on other transportation agencies engaged in foreign commerce, but on the distributors of petroleum products, and the exemptions were extended to the distributors only. Evidence pointing to discrimination between consumers does not establish discrimination between distributors.

All distributors were treated alike, each was exempted from tax on distribution of petroleum products to vessels engaged in foreign commerce, consequently there could be no substantial ground upon which to base

a finding that there was a discrimination as to distributors, the class upon whom the tax was levied.

The state court declared that subdivision (f), Sec. 15, "under which the Seattle Gas Company is exempted from the fuel oil tax," unreasonably discriminated against other public utility companies using oil for the purpose of supplying service to the public. However, the exemption extended not to the Seattle Gas Company, but to distributors withdrawing, selling, or distributing to any person using fuel oil to manufacture gas for sale to the public, and paying the public utility tax, consequently there was a lack of fair and substantial evidence upon which to base a finding that there was unreasonable discrimination between distributors, who actually were alone liable for the tax, and who were not considered in the discussion of the exemption.

All distributors were accorded the same exemption on oil sold, withdrawn, and distributed to gas companies, and all distributors were taxed alike. To conclude that the distributors were classified would be entirely unwarranted by fair and substantial evidence.

E. Devoid of federal grounds, the only non-federal basis upon which the decision can be upheld is that the exemptions of Subdivisions (d), (e) and (f) are invalid, and that the remainder of the statute is broadened in operation by the inclusion within the scope of the statute, of the three classes that were intended by the legislature to be exempt from the tax. Petitioner respectfully submits, that for the following reasons, this conclusion is so unwarranted and unsubstantiated as to be a mere pretense.

With Respect to Exemption (d)

Notwithstanding the invalidation of Subdivision (d), the state, by virtue of Subdivision (a), Sec. 15, is powerless to exact a tax on distributors for transactions had with vessels engaged in foreign commerce, therefore the invalidation of Subdivision (d) will not have the effect of permitting a tax on foreign commerce by vessel, or of broadening the operation of the taxing statute.

The body of the tax enactment did not levy a tax on vessels engaged in foreign commerce, so the invalidation of the exemption would not subject vessels to the tax.

If, however, the tax be construed as a tax on the vessels engaged in foreign commerce, the commerce clause of the federal constitution would prevent the exaction of the excise, and the statute could not be broadened in operation.

The tax was levied on distributors, and the invalidation of the exemption would not bring an additional class within the operation of the statute, but would merely increase the tax burden of the distributor.

With Respect to Exemption (f)

The tax on the face of the statute is levied solely on the distributor, therefore the invalidation of the exemption would merely impose a greater burden on the distributor and would not operate to permit the levy of a tax on the gas companies mentioned in the exemption.

WITH RESPECT TO EXEMPTION (E)

The tax on the face of the statute is levied solely on the *distributor,* likewise, the invalidation of the exemption would merely impose a greater burden on the distributor, and would not subject refiners as such within the state to the tax.

Thus the non-federal ground relied on by the state court is that the revenue act, if broadened in operation by including within its scope, the three subjects intended by the legislature to be exempt, will be unconstitutional.

However, if it be found either that the invalidation of one or more of the exemptions was improper, or that the invalidation of one or more of the exemptions will not have the effect of broadening the enactment to the extent of that or those exemptions, then the non-federal ground will be without substance; for the state decision did not declare that the remainder of the statute would be unconstitutional if broadened in operation to a degree less than that resulting from the validation of all three exemptions.

III

CASES SUSTAINING JURISDICTION OF THIS COURT

Supreme court can review a decision of the state court to determine if the non-federal basis of the decision was supported by fair and substantial grounds.

Ward v. Love County, 253 U. S. 17, 64 L. Ed. 751, 40 S. Ct. 419;

Broad River Co. v. So. Carolina, 281 U. S. 537, 74 L. Ed. 1023, 50 S. Ct. 401.

Supreme court can review a decision of the state court when the state ground is so interwoven with the Federal ground, as not to be an independent matter.

Abie State Bank v. Bryan, 282 U. S. 765, 75 L. Ed. 690, 51 S. Ct. 252.

Supreme court can review a decision of the state court to determine if there was fair and substantial evidence upon which to base the state decision.

Union Pacific Ry. Co. v. Public Service Commission, 248 U. S. 67, 63 L. Ed. 131, 39 S. Ct. 24;

Creswell v. Knights of Pythias, 225 U. S. 246, 56 L. Ed. 1074, 32 S. Ct. 822.

IV

SUBSTANTIAL FEDERAL QUESTION

Petitioner respectfully contends that the decision of the State Supreme Court presents substantial federal questions for the following reasons:

The 14th amendment to the federal constitution was invoked to render unconstitutional that part of the statute imposing a tax on distributors of petroleum products without imposing a corresponding tax on distributors of hard fuels.

No previous case has applied the 14th amendment to the federal constitution for the purpose of striking down a state statute classifying distributors for the purpose of an excise enactment, into distributors of hard fuels, and distributors of petroleum products.

The federal courts have uniformly expressed a willingness to permit reasonable classifications under the 14th amendment to the federal constitution, for the purpose of state excise enactments.

The commerce clause, Art. I, Sec. 8, Clause 3, of the Federal constitution was invoked to invalidate the statute on the ground that unconstitutional burdens were imposed on interstate commerce.

No case has been found holding that nondiscriminatory licenses and bond requirements, and license fees imposed an unconstitutional burden on interstate commerce in violation of the commerce clause of the Federal constitution.

Numerous cases dealing with the federal commerce clause have sustained state nondiscriminatory statutes imposing license fees and license requirements, even though those conditions might incidentally have impact on companies engaged in both interstate and intrastate commerce.

The state court invoked both the 14th amendment to the federal constitution, and the commerce clause of the federal constitution, for the purpose of invalidating the state statute, thus rendering the federal questions substantial in so far as the state decision is concerned.

V

Federal questions were raised in the Superior Court of Thurston County, Washington, in the following manner:

I: Interstate commerce question under Art. I, Sec. 8, Clause 3.

The Great Northern Railway Company, in its Amended Complaint in Intervention in paragraphs XV and XVIII, alleged that the statute imposed an unconstitutional burden on interstate commerce.

The answer of the State of Washington to the Amended Complaint in Intervention of the Great Northern Railway Company, denied paragraphs XV and XVIII.

The Superior Court of Thurston County, found in Conclusions of Law, paragraphs I, III and VIII, that an unconstitutional burden was placed on interstate commerce ;and in the Judgment and Decree, paragraph I, found the same.

II: Discrimination and classification question under the 14th amendment to the Federal Constitution.

The Great Northern Railway Company, in its Amended Complaint in Intervention in paragraphs XIV, XVI and XVIII, alleged that the classifications in the statute violated the fourteenth amendment to the Federal Constitution.

The answer of the State of Washington to the Amended Complaint in Intervention of the Great Northern Railway Company, denied paragraphs XIV, XVI and XVIII.

The Superior Court of Thurston County, found in Conclusions of Law, paragraphs I, III and X, that the classification violated the fourteenth amendment to the Federal Constitution, and in the Judgment and Decree, paragraph I, found the same.

Federal questions were raised on appeal to the Supreme Court of the State of Washington, and disposed of in the following manner:

I: Interstate commerce question under Art. I, Sec. 8, Clause 3.

In Appellants opening brief, in assignments of error I and III.

In appellants Petition for Rehearing or Modifiication at page 41.

In Answer of Interventor-Respondent Great Northern Railway Company to the Petition for Rehearing or Modification at page 22.

In the Opinion and Decision of the Supreme Court of the State of Washington, wherein it was stated that an unconstitutional burden was placed upon interstate commerce in contravention of Art. I, Sec. 8, Clause 3.

II: Discrimination and classification question under the 14th amendment to the Federal Constitution.

In Appellants opening brief, in assignments of error I and III.

In Intervenor-Respondent Great Northern Railway Company's Answering Brief at page 11.

In Appellants petition for rehearing or Modification at page 13.

In Answer of Intervenor-Respondent Great Northern Railway Company to the Petition for Rehearing or Modification, at page 9.

In the Opinion and Decision of the Supreme Court of the State of Washington, wherein it was stated that the classification of the statute was unconstitutional in contravention of the fourteenth amendment to the Federal Constitution.

VI

FEDERAL QUESTIONS

I: Does Chap. 186 of the Laws of 1939 impose unconstitutional burdens on interstate commerce in contravention of Art. I, Sec. 8, Clause 3 of the Federal Constitution?

II: Does Chap. 186 of the Laws of 1939 deny to the distributors of petroleum products the equal protection of laws in contravention of the fourteenth amendment to the Federal Constitution, by imposing a tax on distributors of petroleum products, without imposing a like tax on distributors of hard fuels?

VII

REASONS FOR ALLOWANCE OF THE WRIT

Rule 38, Sec. 5 (a) of the Supreme Court rules provides that this court may exercise discretion to grant a writ of certiorari, "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Petitioner contends that the state court has decided the federal questions differently than they have heretofore been decided by this court.

Chapter 186 of the Laws of 1939 is of vital importance to the State of Washington. The state will be compelled to immediately refund approximately $2,500,000, and will lose an annual revenue of approximately $3,000,000, by the invalidation of the statute.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court directed to the supreme court of the state of Washington, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said supreme court had in the case numbered and entitled on its docket No. 27852 State of Washington, appellant, v. Inland Empire Refineries, Inc., respondent, Montana Headlight Oil Company, a corporation, and Great Northern Railway Company, a corporation, Intervener-Respondents, to the end that this cause may be reviewed by this court as provided by the statutes of the United States; and that the judgment herein of said state supreme court be reversed by this court and for such other and further relief as to this court may seem proper and just.

Dated September 23, 1940.

SMITH TROY,
Attorney General of the State of Washington,

JOHN E. BELCHER,
Assistant Attorney General of the State of Washington.

Attorneys for Petitioner.